DATE: December 1, 1994
CASE NO. 92-ERA-37

IN THE MATTER OF

GREGORY A. SPRAGUE,

COMPLAINANT,

v.

AMERICAN NUCLEAR RESOURCES, INC.,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER

Gregory Sprague complained that Respondent American Nuclear Resources, Inc. (ANR) violated the employee protection provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988), [1] when it terminated his employment. In a Recommended Decision and Order (R.D. and O.), the Administrative Law Judge (ALJ) found that the reasons ANR gave for termination were not credible and that ANR violated the ERA. I agree with the ALJ's recommendation and find that Sprague also prevails under an alternative analysis.

I. Preliminary Issue

ANR has moved to strike Complainant's brief as untimely filed. Resp. Reply Br. at 3. The March 18, 1993, briefing order in this case provided that both parties submit briefs within 30 days of receipt of the order. Return receipt cards show that Sprague received a copy of the briefing order on March 24, 1993, and that his counsel received a copy the next day. Accordingly, Sprague's brief was due within 30 days of March 25, or on April 24, 1993. [2] Sprague served a copy of his brief on June 9, 1993, without requesting either an enlargement of time or leave to file the brief out of time.

Since Sprague has provided no explanation for the lateness

of his brief, ANR's motion to strike the brief is granted. Complainant's brief to the Secretary will be placed with the record in this case but it has not been considered in reaching

this decision.

II. Facts

The entire record has been reviewed. I find that the ALJ's findings of fact, R.D. and O. at 2-6, are well based in the record and I adopt them. I repeat here only the facts essential to understanding the discussion of the law.

ANR, a contractor at the D.C. Cook Nuclear Plant, hired Sprague in January 1992 as a tool accountability technician. T. 14, 37. Although the job was intermittent, ANR informed Sprague that it was expected to continue through September 1992. T. 16.

On March 19, 1992, Sprague volunteered to stay in the containment area of the plant after some radiation had escaped and become airborne. T. 51. Sprague complained to his supervisor, Georgina Emanuel, that the radiation protection personnel (RPs) did not know what they were doing. T. 52. Emanuel testified that Sprague was yelling at the time, T. 52, but Sprague denied it. T. 119.

The same day, Emanuel determined that Sprague was one of four tool accountability employees to be laid off. T. 54. Emanuel initially intended to recall all four employees when the work picked up. *Id.*

Sprague reported to work the next day for a required "full body count" of his radiation contamination. T. 16. It took a few minutes to do the count of the other three employees who were laid off, but Sprague's count took two hours because his radiation level was abnormally high. T. 17. Emanuel said that Sprague yelled at the RPs for about one hour during the process. T. 59. Sprague testified that he became upset with RPs but did not argue with them. T. 120-122.

According to Emanuel, all four employees received a copy of their exposure reports. T. 60. When Sprague asked for a copy of the results of the body count test as well, [3] Emanuel denied it because she believed that employees never receive them. T. 88-89. The RPs also denied Sprague's request for a copy. T. 17, 30, 123.

Emanuel testified that Sprague's behavior with the RPs convinced her to terminate his employment permanently. T. 82. Sprague's final lay off notice stated that he would not be rehired because of "poor work quality and bad attitude," T. 61-63; RX 1, but Sprague did not see it and no one informed him that his lay off was permanent. T. 21. Later that day, Sprague spoke with a representative of the Nuclear Regulatory Commission (NRC),

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asked whether he was entitled to a copy of the results of the full body count, and was told he would receive it soon. T. 17.

A few weeks later Sprague inquired about being recalled and the Personnel Department told him that ANR would no longer need his services. T. 22. Sprague filed this complaint alleging that ANR fired him for carrying out the purposes of the ERA when he asked for the results of the body count and also spoke with the NRC representative about it.

III. Merits

The ERA's employee protection provision proscribes

discharging an employee because he has "assisted or participated or is about to assist or participate in any manner" in a proceeding brought under the ERA. 42 U.S.C. § 5851(a)(3). To make a prima facie case, the complainant must show that he engaged in protected activity, that he was subjected to adverse action, and that respondent was aware of the protected activity when it took the adverse action. Complainant must also raise the inference that the protected activity was the likely reason for the adverse action. *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Ord., Apr. 25, 1983, slip op. at 8.

There is no dispute that Sprague's contact with the NRC representative regarding his exposure to radiation was protected under the ERA. Resp. Br. at 4. ANR contends, however, that the ALJ erred in finding that Sprague's protected activities included asking the RPs questions and requesting from them a copy of the results of the body count. Resp. Br. at 8-11. Although the RPs worked for a contractor other than ANR, I find that Sprague's questions to them constituted protected internal activities, since the RPs were responsible for Sprague's radiological safety as an ANR employee.

The majority of courts agree that internal safety complaints are protected by the ERA. *Jones v. Tennessee Valley Authority*, 948 F.2d 258, 264 (6th Cir. 1991); [4] *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1513 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984). *But see*, *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984) (ERA protects only complaints to external governmental entities).

In keeping with the "broad, remedial purpose of protecting workers from retaliation based on concerns for safety and quality," *Mackowiak*, 735 F.2d at 1163, I have held that an employee's "questioning of the safety procedure [a foreman] used was tantamount to a complaint that the correct safety procedure was not being observed" and thus constituted protected activity under the ERA. *Nichols v. Bechtel Construction, Inc.*,, Case No. 87-ERA-0044, Dec. and Ord. of Remand, Oct. 26, 1992, slip op. at 10-11, appeal of final decision docketed, *Bechtel Constr. Co. v.*

[PAGE 4]

Reich, No. 94-4067 (11th Cir. Jan. 11, 1994). *See also*, *Dysert v. Westinghouse Elec. Corp.*, Case No. 86-ERA-39, Final Dec. and Ord., Oct. 30, 1991, slip op. at 1-3 (employee's complaints to team leader about procedures used in testing instruments constituted protected internal complaint). For example, in *Lockert v. U.S. Dep't of Labor*, 867 F.2d 513 (9th Cir. 1989), the court affirmed the Secretary's finding that protected activity included an employee's seeking information from his employer in certain circumstances.

Sprague's repeated requests to the RP personnel about what was happening during the two hour process of taking his whole body count was similar to the questioning in *Nichols*. As the ALJ reasoned, R.D. and O. at 9:

> The record in this case clearly supports a finding that the Complainant requested a full body count report from

the [RP's] out of concern for his safety. Moreover, I find that his concern about radiation levels was a valid one, as his readings were abnormally high. . . . It would disserve the protective purposes of the Act if an employer was free to fire an employee for requesting information concerning the amount of radiation to which he had been exposed, or, in this case because he asked for the information in a manner deemed unacceptable to the Respondent.

Keeping in mind that I should avoid a "narrow, hypertechnical reading" of the ERA's employee protection provision, which would "do little to effect the statute's aim of protection," *Kansas Gas & Elec.*, 780 F.2d at 1512, I agree with the ALJ that Sprague's "questioning of the [RPs] was a legitimate health and safety concern which afforded him the protection of the statute." R.D. and O. at 9. [5]

There is no dispute that Sprague's discharge was an adverse action under the ERA and that Emanuel was aware of Sprague's questioning the RPs when she decided that Sprague would not be recalled after lay off.

The final element of a prima facie case is raising the inference that the respondent took the adverse action because of the complainant's protected activities. *Dartey*, slip op. at 8. Emanuel testified that she decided that Sprague's lay off should be permanent because of the way he questioned the RPs. T. 82. I therefore find that Sprague established causation and a prima facie case of an ERA violation.

Respondent had the burden of articulating a legitimate reason for the discharge, *Dartey*, slip op. at 8, and ANR did so by stating that Sprague should not be rehired because of "poor work quality and bad attitude." RX 1.

As Complainant, Sprague had the burden of showing that the

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reasons ANR gave for the discharge were a pretext for discrimination. *Dartey*, slip op. at 8. At all times, Sprague had the burden of establishing that the real reason for the discharge was discriminatory. *Thomas v. Arizona Public Service Co.*, Case No. 89-ERA-19, Final Dec. and Order, Sept. 17, 1993, slip op. at 20; *St. Mary's Honor Center v. Hicks*, 125 L.Ed. 2d 407, 418-419 (1993).

ANR argues that even if Sprague engaged in a protected activity when he spoke with the RPs, nevertheless it was lawful to discharge him "for the disruptive manner in which he conducted that activity." Resp. Reply Br. at 1-2. I agree that even when an employee has engaged in protected activities, employers legitimately may discharge for insubordinate behavior, work refusal, and disruption. *See, e.g., Dunham v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986) ("[a]busive and profane language coupled with defiant conduct or demeanor justify an employee's discharge on the grounds of insubordination" even though the employee had also engaged in protected activity); *Abu-Hjeli v. Potomac Elec. Power Co.*, Case No. 89-WPC-01, Final Dec. and Order, Sept. 24, 1993, slip op. at 15-18 (employer legitimately discharged employee who refused work and whose shouting and explosive tantrums disturbed the work of others); *Couty v. Arkansas Power & Light Co.*, Case No. 87-ERA-10,

Final Dec. and Order on Remand, Feb. 13, 1992, slip op. at 2 (no violation where Complainant engaged in abusive, disruptive, profane, and threatening behavior towards supervisors); *Hale v. Baldwin Associates*, Case No. 85-ERA-37, Final Dec. and Order, Sep. 29, 1989, adopting ALJ Recommended Dec. and Order, Oct. 20, 1986, slip op. at 26 (no statutory violation where employee discharged for not accepting assignments and for disrupting the work place).

As the ALJ stated, the Secretary has recognized that it is normal for employees engaging in protected activities to exhibit impulsive behavior and that such employees may not be disciplined for insubordination so long as their behavior is lawful and their "conduct is not indefensible in its context." R.D. and O. at 9-10, citing *Kenneway v. Matlock, Inc.*, Case No. 88-STA-20, Sec. Dec. and Order, June 15, 1989, slip op. at 6. In this case, the ALJ correctly balanced Sprague's purported loud behavior against his right to express a legitimate safety concern about the amount of radiation to which he had been exposed. Like the ALJ, I find that Sprague's behavior did not impede the orderly operation of ANR's business activities. R.D. and O. at 10. Sprague did not refuse any assignments or disrupt the work of others. Where, as here, the complainant's alleged misconduct was "nothing more than the result and manifestation of his protected activity," the conduct does not remove the complainant from statutory protection. *Dodd v. Polysar Latex*, Case No. 88-SWD-00004, Dec.

[PAGE 6]

and Order, Oct. 6, 1994, slip op. at 15-17.

I further agree with the ALJ's assessment that the stated reasons for firing Sprague, poor work quality and bad attitude, RX 1, are not credible and were a pretext for discrimination. [6] *See Dodd*, and cases cited therein at slip op at 15-17. R.D. and O. at 11. I therefore affirm the ALJ's conclusion that Sprague persuaded that ANR fired him because he engaged in protected activities.

Even assuming that Sprague's attitude and purported loudness were legitimate bases to fire him, I find that ANR also had an impermissible reason, Sprague's insisting on obtaining more information about the radiation hazard to which he was exposed. When the employer's adverse action against the employee was motivated by both prohibited and legitimate reasons, the dual motive doctrine applies. *Dartey*, slip op. at 8-9; *see Mackowiak*, 735 F.2d at 1163; *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). In such a case, the employer has the burden to show by a preponderance of the evidence that it would have taken the same action concerning the employee even in the absence of the protected conduct. *Dartey*, slip op. at 9; *Mackowiak*, 735 F.2d at 1164; *Mt. Healthy*, 429 U.S. at 287; *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (plurality opinion). The employer bears the risk that the influence of legal and illegal motives cannot be separated. *Mackowiak*, 735 F.2d at 1164; *Guttman v. Passaic Valley Sewerage Comm'rs*, Case No. 85-WPC-2, Final Dec. and Order, Mar. 13, 1992, slip op. at 19, *aff'd sub nom. Passaic Valley Sewerage Comm'rs v. United States*

Dept. of Labor, 992 F.2d 474 (3d Cir. 1993).

Here, the allegedly loud behavior occurred while Sprague was asserting his need for more information regarding radiation exposure and cannot be separated from the protected activity. I find that ANR has not sustained the burden of showing that it would have fired Sprague even if he had not engaged in protected activities. Therefore Complainant prevails under the dual motive analysis as well.

IV. The Remedy

The ALJ ordered reinstatement and payment of back pay from the date of lay off until reinstatement. R.D. and O. at 11. [7] He further ordered that back pay is to be computed based on the average hours worked by tool accountability technicians. [8] *Id.* I find that back pay shall be computed from March 20, 1992 through the date of reinstatement to a tool accountability technician or comparable position (or the date of declination of an offer of reinstatement). If ANR demonstrates that there are no tool accountability techinician or any comparable positions, back pay shall end on the date the tool accountability technician position ended. *See* R.D. and O. at 11. I agree with the ALJ

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that back pay shall be based on the average number of hours worked by the tool accountability technicians.

The ALJ did not order payment of interest on the back pay award, although the Secretary consistently has required it. *See Blackburn v. Metric Constructors, Inc.*, Case No. 86-ERA-4, Dec. and Order on Damages, Oct. 30, 1991, slip op. at 18-19, *aff'd in relevant part and rev'd on other grounds*, 982 F.2d 125 (4th Cir. 1992). Accordingly, Respondent shall pay interest on the back pay at the rate specified in 26 U.S.C. § 6621 (interest on underpayment of Federal income tax) until the date of compliance with this Order.

The ALJ correctly noted that the back pay award is to be offset by Sprague's interim earnings, but not by unemployment compensation he received. The tool accountability technicians' work schedule was periodic; employees worked for a period of weeks, followed by some weeks of lay off. T. 16. Sprague testified that during a lay off from ANR he would have been able to do the "odds and ends" job about which he testified. T. 23-24. The earnings from any interim positions that Sprague would have been able to hold even if ANR had not discriminated against him should not be deducted from the back pay award. *See Marcus v. U.S. Environmental Protection Agency*, Case No. 92-TSC-5, Order of Remand, Sept. 27, 1994, slip op. at 2-3. Therefore, the $550 Sprague earned doing odd jobs should not be deducted from the back pay.

ORDER

1. Respondent shall make Complainant whole for any losses he suffered as a result of the discriminatory lay off. Respondent shall pay Complainant back pay from the date of lay off (March 20, 1992), until the date of reinstatement to his former or a comparable position (or until declination of the offer). Back pay is to be computed based on the average hours worked by tool accountability technicians for the period of time the

Complainant would have been employed but for the unlawful lay off. If there are no tool accountability or comparable positions, back pay is to be computed to the date on which the tool accountability technician position ceased to exist. Respondent shall deduct from the back pay any interim earnings that Complainant would not have earned had he remained employed by Respondent. Unemployment compensation Complainant received shall not be deducted from the back pay award. Respondent shall pay interest on the back pay at the rate specified in 26 U.S.C. § 6621, through the date of Compliance with this order. If the parties cannot agree on the amount of back pay and interest, they shall so inform the ALJ, who will resolve the issue in a Supplemental Recommended Decision and Order.

[PAGE 8]

2. Any adverse reasons for termination stated in the Complainant's personnel file shall be expunged and such reasons shall not be used against Complainant in the event he applies for any future employment opportunities with Respondent, or in providing a reference concerning Complainant to any other potential employers.

3. Respondent shall reimburse Complainant's attorney fee and the costs incurred in bringing and prosecuting the complaint. Complainant's counsel shall, within 30 days of the date of this Decision and Order, submit an itemized fee petition to the Administrative Law Judge and provide a copy to Respondent. Respondent shall have 30 days after receipt of Complainant's petition to submit any objection thereto.

4. The ALJ shall issue a Supplemental Recommended Decision and Order establishing the amount of the attorney fee and costs, and if necessary, the amount of back pay and interest.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The amendments to the ERA contained in the National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, do not apply to this case in which the complaint was filed prior to the effective date of the Act.

[2] ANR timely served its brief on April 23, 1993.

[3] The exposure report is in an easily readable form, whereas the results of the body count are not. T. 88.

[4] The decisions of the Sixth Circuit are controlling in this case, which arose in Michigan. I disagree with ANR (Resp. Br. at 9) that in *Deford v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983), the Sixth Circuit ruled that participation in an NRC investigation or enforcement proceeding is the only activity protected under the ERA. In that case, the respondent "conceded that DeFord participated in an NRC proceeding within the purview of the Act." 700 F.2d at 286. In any event, the Court more recently has indicated that internal complaints are protected under the ERA. *Jones*, 948 F.2d at 264.

[5] ANR argues that Sprague's complaint did not include an allegation that the information request to the RPs was a protected activity. Resp. Br. at 5. Sprague alleged that he asked for a copy of the results of the whole body count immediately after it was completed, and later asked the NRC for a copy. ALJX 1 Par. 4. He further alleged that, "[i]n requesting information about his body count, Complainant was acting under his rights available by law. He was also entitled to contact the Nuclear Regulatory Commission." ALJX 1 Par. 7. I find that the complaint clearly alleged that Sprague was terminated for requesting safety information internally as well as from the NRC.

Similarly, I do not credit ANR's statement, Resp. Br. at 5-6, that it did not call any of the RPs to testify because it was unaware that Sprague contended that his dealing with the RPs was a protected activity. I also reject the argument that the ALJ could not consider Sprague's request for information from the RPs because the allegation was time barred and he failed to exhaust his administrative remedies concerning it. *See* Resp. Br. at 7-8.

[6] I affirm the ALJ's finding that the sole example Emanuel gave about the allegedly poor quality of Sprague's work in fact was a misunderstanding on Sprague's part that did not merit disciplinary action. R.D. and O. at 11.

[7] Sprague testified that he expected his position to continue until September 1992. T. 16. ANR conceded that had Sprague remained employed by ANR, he would have been laid off approximately in October 1992 when the plant went back on line. T. 67-68. The ALJ also ordered that if the tool accountability technician position no longer exists, back pay would terminate on the date the position was eliminated. R.D. and O. at 11.

[8] The parties stipulated the average hours worked from March 20 through September 6, 1992. T. 69.